

1 UNITED STATES OF AMERICA  
2 FOR THE NORTHERN DISTRICT OF OHIO  
3 EASTERN DIVISION  
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7 ORAL SODIUM PHOSPHATE )  
8 SOLUTION-BASED PRODUCTS ) Case No. 09SP80000  
9 LIABILITY ACTION )  
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15 TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE  
16 JUDGE ANN ALDRICH, JUDGE OF SAID COURT,  
17 ON THURSDAY, AUGUST 20TH, 2009,  
18 COMMENCING AT 1:30 O'CLOCK P.M.  
19  
20

21  
22 Court Reporter: GEORGE J. STAUDUHAR  
23 801 W. SUPERIOR AVE.,  
24 SUITE 7-184  
25 CLEVELAND, OHIO 44113  
(216) 357-7128

P R O C E E D I N G S

(Case called.)

MR. CLIMACO: Good afternoon, your Honor.

THE COURT: Let me thank you all for being here and just make sure that everyone who is here has signed the sign-in sheet. If anyone missed signing in, we will be sure that before you leave, that you do sign it.

Initially, let's see, I need to remind the liaison counsel that the Court wants an electronic contact list of all the attorneys on each side. I think we have a list, but I am not sure if we have all of them.

MR. CLIMACO: We have ours, your Honor.

THE COURT: Thank you, Mr. Climaco.

MR. LANHAM: Sam Lanham from Maine. We cannot hear anything.

THE COURT: Can you hear anything now?

MR. LANHAM: Still cannot hear.

(Pause.)

THE COURT: If you can't hear me now, just raise your hand. All right.

(Laughter.)

THE COURT: If you didn't hear, what I suggested was anyone who didn't sign the sign-in sheet be

1 sure that you sign it before you leave, and my clerks  
2 will be available for you to sign in, and then I was  
3 reminding the liaison counsel that I want an electronic  
4 contact list of all the attorneys on each side.

5 I think Mr. Climaco provided —

6 MR. CLIMACO: Yes, your Honor, we did.

7 MR. SNYDER: And, your Honor, Mike Snyder.

8 We also just submitted ours as well on behalf of the  
9 defense so both are in.

10 THE COURT: Thank you.

11 MR. SNYDER: Thank you, your Honor.

12 THE COURT: I think initially we should  
13 start with the things with respect to which everyone is  
14 agreed; that I am going to be appointing a special  
15 master, David Cohen. Mr. Cohen is right there, and I  
16 will be putting out the order appointing him, and the  
17 indication from both sides was that no one objected to my  
18 appointing Mr. Cohen.

19 He has done a considerable amount of work  
20 for other judges on MDL cases. He clerked for me in the  
21 early '90s, and he has been — has made great progress  
22 ever since. And also, I will introduce you to my clerk,  
23 Alex Frondorf, who will be the law clerk that is also  
24 involved with this case.

25 And I had appointed Mr. Climaco as the

1 interim Plaintiffs' liaison counsel, and I will now  
2 make that a permanent appointment for the rest of this  
3 case.

4 MR. CLIMACO: Thank you, your Honor.

5 THE COURT: And if I can then move on  
6 to —

7 MR. CLIMACO: May I raise a matter as to  
8 Mr. Cohen?

9 THE COURT: You may.

10 MR. CLIMACO: It is the Plaintiffs' position  
11 we would like to see Mr. Cohen have the authority and  
12 responsibility and follow the model that was first  
13 established in front of Judge Kathleen O'Malley in the  
14 Selzer case and is now being utilized in the welding fume  
15 litigate.

16 I am liaison counsel in the welding fume. I  
17 was with one of co-lead in Selzer, and I want to  
18 represent to the Court and I know the great faith and  
19 respect you have that both of those cases moved  
20 expeditiously, not only because of the hard work of  
21 Judge O'Malley and her staff, but we are talking about a  
22 voluminous amount of litigation, and much of it, all  
23 parties and all counsel were helped and have the greatest  
24 respect for Mr. Cohen.

25 THE COURT: Thank you. I think that's one

1 of the reasons I was pleased that no one objected to me  
2 appointing him as a special master, because I know from  
3 the work that he did with me, that we both moved  
4 expeditiously, and I want to see these cases moved as  
5 quickly and fairly as is possible.

6 The defense had as co-lead counsel  
7 Nina Gusik of Pepper Hamilton in Philadelphia and Earl  
8 Gunn of the Weinberg Wheeler firm in Atlanta.

9 MR. GUNN: Yes, your Honor. I am Billy Gunn  
10 and Ms. Nina Gusik is not able to be here today because  
11 she is taking her daughter to college, and I will have to  
12 leave early because I have a court order to be in  
13 Florida.

14 THE COURT: All right. And we now then have  
15 some issues here with respect to — well, one other  
16 question that I have with respect to the defense: It has  
17 been indicated that there may be some generic  
18 manufacturers who may at some point get to be defendants  
19 in this case.

20 Do we need to include any lawyers from —  
21 who are representing other defendants than Fleet?  
22 Perhaps you can speak to that.

23 MR. GUNN: We haven't seen anything in  
24 response to that motion that was filed, and I believe we  
25 would be opposing expanding this litigation. This is

1 fairly well developed litigation, and when it is  
2 appropriate, I will address it, but our goal is to  
3 resolve this litigation; not litigate it.

4 THE COURT: I am very pleased to hear  
5 that.

6 MR. GUNN: Well, yes.

7 MR. LASZLO: Your Honor, if I may,  
8 Theodore Laszlo. I am the attorney of this group of  
9 Plaintiffs' lawyers who has handled some of these generic  
10 cases.

11 There is one pending in the Southern  
12 District that we have tried to move into this because  
13 this is the OSPS MDL, not just the Fleet MDL but the OSPS  
14 MDL.

15 We understand that the defendants in that  
16 case, Unico, Boeing and CVS, will object to the transfer.  
17 Their papers were due, I believe, today, and we will  
18 address that. Those defendants are represented by the  
19 Reminger office in Cincinnati. So I would say if the  
20 Panel decides to include the OSPS generic defendants,  
21 they may, indeed, want that voice on the defense side.

22 THE COURT: But at this point in time, no  
23 one thinks we should take any particular action.

24 MR. LASZLO: Not at this time, your  
25 Honor.

1 THE COURT: Or just aware of what's possibly  
2 out there.

3 MR. LASZLO: Yes.

4 THE COURT: And I think it will depend a  
5 great deal on the extent to which some of those cases  
6 litigate. But I will listen to both sides when, and if  
7 we — that issue comes up, but I don't think there is  
8 anything based on what you both said, there isn't  
9 anything we need to do right at this point in time other  
10 than whatever the MDL panel may do.

11 MR. LASZLO: Agreed, your Honor.

12 THE COURT: Now, with respect to Plaintiffs,  
13 we have Mr. Climaco as their liaison. We seem to have  
14 two groups who have met, I believe, at least three times  
15 in an effort to pick their lead counsel, and I would like  
16 to ask: Do you need more time to provide the Court with  
17 your choices, or are you telling me now that even if you  
18 keep on meeting any more, you are not going to make any  
19 more progress.

20 Mr. Climaco?

21 MR. CLIMACO: Your Honor, John Climaco, and  
22 I appreciate the respect you showed me by affording me  
23 the interim and appointing me lead. As the record will  
24 show, I requested and filed an application at the request  
25 of Paul Rheingold, Mark Tate, and some of my other

1 friends who I worked with in the past. I did not know  
2 the attorneys that have been led by Steve Foley, but I  
3 have come to know all the attorneys.

4 As a result of talking with them on the  
5 telephone, in meeting them in my office on two occasions,  
6 I have made an effort to have them joined together, and  
7 there are some issues that have separated them. They  
8 all -- I am just literally amazed, your Honor, there is a  
9 lot more work to be done in this case.

10 But the breadth, knowledge, and the depth of  
11 knowledge of the attorneys who have litigated this case  
12 to date is huge, and I have great respect for them. I  
13 attempted to reach an agreement with them when they were  
14 in my office for lunch a few weeks ago, and today we  
15 had been meeting in my office as a group from about  
16 11 o'clock.

17 I met last night with Mr. Foley, Mr. Laszlo,  
18 and some of the others. I met at 8 o'clock this morning  
19 with Mr. Shkolnik and Mr. Paul Rheingold, and after  
20 everyone -- and I should take a moment, this is Dawn  
21 Chmielewski working with us, my partner John Peca and  
22 Gwen Hennessy are liaison. John is also a chef, and he  
23 cooked lunch. And after lunch, it was quite obvious that  
24 we weren't getting anywhere.

25 So I walked in, and I shut the door, and I



1 said "ladies and gentlemen, this afternoon I am going to  
2 give my recommendation to the Judge. I believe I have a  
3 responsibility, but I am going to walk out of here, shut  
4 the door, and if you have fighting to do, do it right  
5 here, and let's get it over with and reach an agreement."

6 It appeared from when I walked in and what I  
7 heard that in many ways they were closer to a resolution  
8 than I thought they might be, but at this time, they do  
9 not have one.

10 My recommendation — and I have told all of  
11 them this before — is there be two co-lead counsel, and  
12 that is this gentleman, who I would like to introduce you  
13 to.

14 MR. SHKOLNIK: Good afternoon, your Honor,  
15 Hunter Shkolnik.

16 MR. CLIMACO: And he is Paul Rheingold's  
17 partner and Steve Foley of Foley and Mansfield.

18 MR. FOLEY: Good afternoon.

19 THE COURT: Afternoon.

20 MR. CLIMACO: And now that you have  
21 appointed me, your Honor, I will continue to act — one  
22 of the early discussions was, well, if we have two, even  
23 if there is some disagreement, which I never anticipate  
24 there will be, Climaco can help break the tie, and I am  
25 willing to do that. I have the utmost respect for these

1 two attorneys. Agreement can't be reached.

2 That's my recommendation, and there are  
3 enough good lawyers that once the co-lead are in place a  
4 Plaintiffs steering committee can be appointed, and we  
5 can work through this case.

6 With all that said and on the record, I  
7 think it would be useful, your Honor, to let me keep  
8 trying and give us a little more time, and I have told  
9 them I was going to ask for that. And if we were not  
10 successful, I also told them that I am sure the Court  
11 will make its own decision, and that might be two  
12 co-leads, three co-leads, one co-lead, but it will be the  
13 Court's decision.

14 And I said I know the Court would prefer  
15 that all of you make a decision. But they are — the  
16 reason they are good lawyers because they are aggressive,  
17 they know what they are doing, and everyone wants to be  
18 boss.

19 Thank you.

20 THE COURT: Well, I did notice there were  
21 three lawyers that are on both — both these groups,  
22 either on the executive committee or the steering  
23 committee, and that is Mr. DeCarlo, Bernard Daskal, and  
24 David Szerlag. So there has to be the potential for some  
25 agreement as to — for you to work that out, but I think

1 I am of the same mind here perhaps as Mr. Climaco and  
2 would suggest that if you can work it out so the  
3 Plaintiffs can choose their own lead counsel with some  
4 agreement and with members of their executive committee  
5 and the steering committee, I would prefer to have it  
6 done that way.

7 So I will give you and the group until  
8 August 31st to get back to me. If you don't have your  
9 members, people selected, then the Court will proceed  
10 very promptly to choose.

11 MR. CLIMACO: Thank you, your Honor.

12 THE COURT: Well, I will choose counsel, and  
13 for the executive committee, I think that by that time  
14 they should be able to sort out the steering committee.

15 MR. CLIMACO: (Nodding affirmatively.)

16 THE COURT: Now, if there is anyone that  
17 thinks I am missing something and want to comment on this  
18 procedure, the gentlemen sitting across the room,  
19 Mr. Climaco —

20 MR. CLIMACO: Yes. No, Mr. Tate —

21 THE COURT: It appeared to me he wanted to  
22 be saying something.

23 MR. CLIMACO: No. Mr. Tate has decided he  
24 has nothing to say at this time.

25 (Laughter.)

1 MR. TATE: Much to the chagrin of the entire  
2 courtroom.

3 MR. CLIMACO: And there are a few others  
4 that I had hesitation that you might be hearing from, but  
5 we have silence.

6 THE COURT: Please don't both talk at the  
7 same time because the court reporter can't get down what  
8 both of you are saying.

9 MR. TATE: I have nothing to add, and  
10 Mr. Climaco said everything. And the Court expressed its  
11 opinion, and I appreciate that.

12 THE COURT: I think for the record here I  
13 would like very much if each of the counsel would just  
14 stand up and give us their name and with the Defendant.  
15 So far we know that Defendants all represent the defense  
16 here, Fleet, but with respect to the Plaintiffs' counsel,  
17 what I would like to know from each of you is how many  
18 clients do you have, how many in state court, federal  
19 court, or not yet filed. So I guess it might be quicker  
20 if we start with the defense counsel if you have give me  
21 your name.

22 MR. KOULETIS: Nicholas Kouletsis, Pepper  
23 Hamilton.

24 THE COURT: Thank you.

25 MR. NEKRAWCHAK: Good afternoon, your Honor.

1 I am John Nekrawchak with the Weinberg Wheeler law firm  
2 in Atlanta.

3 MS. STAUBS: Good afternoon. Ellen Staubs  
4 with Pepper Hamilton in Philadelphia. We represent  
5 Fleet.

6 THE COURT: Thank you.

7 MR. SNYDER: Good afternoon, your Honor.  
8 Mike Snyder from McDonald Hopkins. We are here on behalf  
9 of Fleet, and we are interim liaison counsel.

10 THE COURT: Thank you.

11 MR. McKEE: Your Honor, Dan Makee, and I am  
12 with Mr. Snyder, McDonald Hopkins.

13 THE COURT: Okay.

14 MR. GUNN: Your Honor, we would request that  
15 you go ahead and appoint them just as liaison counsel and  
16 remove the interim.

17 THE COURT: I'm sorry. Yes, I thought I did  
18 that. I'm sorry.

19 Yes, we will appoint them as liaison counsel  
20 for the Defendant. So you are now permanent and not  
21 interim.

22 MR. SNYDER: Thank you, your Honor. Thank  
23 you very much.

24 THE COURT: Now we get to the Plaintiffs.

25 MR. TATE: Well, Judge, Mark Tate, and I am

1 here, I've got John Baker who is a lawyer who works with  
2 us and Susy Counsel who works with us as well. We have  
3 approximately 300 cases, and we have about 50 filed, all  
4 in federal court, and they have all been transferred  
5 over, and they are now in front of you, Judge.

6 THE COURT: Thank you very much.

7 MR. SZERLAG: Good afternoon, your Honor.  
8 David Szerlag, Pritzker Olsen, Minneapolis. I represent  
9 approximately 50 Plaintiffs. I have, I believe, 14 in  
10 the federal court, and all of them are venued out of  
11 Arizona at the present time, and I have none in state  
12 court.

13 MR. FOLEY: Steve Foley of Foley and  
14 Mansfield. With me is Mike DeCourcy from my office and  
15 Howard Wallach who is one of my partners in my Michigan  
16 office.

17 THE COURT: Thank you.

18 MR. FOLEY: We have approximately 35 cases,  
19 I believe, filed right now, and I believe six are under  
20 consideration where we are going true the medical records  
21 at this point. All of them are in federal court except  
22 for a number — there are two in state court in Michigan  
23 and three pending in state court in California.

24 And all the others have been — there is  
25 actually one still in California Central District, which

1 has not yet been removed here. I expect eventually it  
2 will make its way here. Otherwise, our cases are in  
3 front of your Honor.

4 THE COURT: Thank you.

5 MR. LASZLO: Your Honor, Theodore Laszlo,  
6 Laszlo and Associates, Boulder, Colorado, and Cleveland,  
7 and we probably have 12 cases filed all in federal court  
8 and another 14 to 20 under consideration and evaluation  
9 right now.

10 THE COURT: Thank you.

11 MR. DASKAL: Good afternoon, your Honor.

12 Bernard Daskal of Lynch, Daskal, Emery, and  
13 with me is Scott Harford from my office. We presently  
14 have, I believe, four cases filed, all in New York State.  
15 The one case that we had before your Honor has since been  
16 resolved, and we have about approximately two dozen cases  
17 under investigation presently.

18 MR. SHKOLNIK: Your Honor, Hunter Shkolnik  
19 with the law firm of Rheingold, Valet. My senior  
20 partner, Paul Rheingold, is here as well. We have 50  
21 cases under investigation at the present time; one in  
22 federal court being transferred here if it is not  
23 already, and one in state court.

24 THE COURT: Thank you.

25 MS. HARRINGTON: Your Honor, I am Kathryn

1 Harrington with Hollis, Wright, and Harrington from  
2 Birmingham, Alabama. We have five cases filed in federal  
3 court in Alabama and 62 cases that we have under  
4 consideration.

5 THE COURT: Thank you.

6 MR. CORY: Good afternoon, your Honor. I am  
7 Jerry Cory. I am from Birmingham, Alabama, with the law  
8 firm of Cory, Watson. We have one case filed in federal  
9 court and probably when it is all said and done we have  
10 probably less than 30 cases.

11 THE COURT: Thank you.

12 MR. O'ROURKE: Excuse me. Your Honor, my  
13 name is Michael O'Rourke. I am from Chicago. We have  
14 approximately 50 cases under investigation. We have none  
15 filed to date, and counsel I am working with include  
16 Red Talber and Jack Kramer from Indiana, your Honor, in  
17 the jury box, and we have 50 cases.

18 Thank you very much, your Honor.

19 THE COURT: Thank you. Anybody else? In  
20 the back of the room?

21 THE WITNESS: Your Honor, my name is Arvin  
22 Richards of Roetzel and Andress in Akron, Ohio, and I am  
23 working with Mark Robchuk, and we have 2 cases we just  
24 filed here in federal court.

25 THE COURT: Okay. Thank you.



1 MR. LANHAM: Your Honor, this is Sam Lanham  
2 on the phone — excuse me, your Honor.

3 THE COURT: Yes. Can you tell us what law  
4 firm you are with and how many cases you have in federal  
5 court or state court.

6 MR. LANHAM: Yes. Sam Lanham with the firm  
7 of Lanham, Blackwell in Bangor, Maine; one case filed in  
8 the District of Maine and transferred to your Court.

9 THE COURT: All right. Thank you.

10 MR. SHAW: Yes, and also on the phone, your,  
11 Honor, is Shaw. I have got my own firm, Jeffrey O. Shaw  
12 in Atlanta.

13 THE COURT: And let's go ahead, how many  
14 cases do you have?

15 MR. SHAW: I have three cases transferred to  
16 you, and I have about three others under investigation.

17 THE COURT: All right. Thank you.

18 MR. GOZA: Your Honor, my name is Kirk Goza  
19 with the law firm of Goza and Holland in Kansas City;  
20 have a case filed in state court but I think is in the  
21 final efforts of being resolved and then a case that had  
22 been transferred to this Court recently, and I have about  
23 25 cases under investigation.

24 THE COURT: Thank you.

25 MR. SHUB: Your Honor, Jonathan Chubbs,

1 Cedar, Weiss in Philadelphia. If I can ask the Court to  
2 skip over me, I am trying to get that information as we  
3 speak to give you a report, so if I can go to the end.  
4 of the line.

5 MR. ANDERSON: Your Honor, Benjamin Anderson  
6 from Anderson law offices here in Cleveland. We have six  
7 that are about to be transferred all in federal court,  
8 and we have 32 under investigation.

9 THE COURT: All right.

10 MR. RHEINGOLD: Paul Rheingold, your Honor,  
11 New York City. My partner Mr. Shkolnik has explained our  
12 firm.

13 THE COURT: Thank you. Anybody else?

14 MR. KRAMER: Your Honor, Jack Kramer with  
15 Red Taber, and our position has been previously  
16 disclosed.

17 THE COURT: Thank you.

18 MR. HARFORD: Your Honor, Scott Harford,  
19 from Lynch, Daskal, Emery, and Bernard Daskal has  
20 disclosed our position.

21 THE COURT: Thank you.

22 MR. DeCARLO: Your Honor, Jeffrey DeCarlo.  
23 I am a sole practitioner. I have about 20 cases under  
24 investigation; about 30 — approximately 30 cases filed  
25 in federal court and another about 20 in state court.

1 THE COURT: Thank you.

2 MR. SMITH: Your Honor, Roger Smith with  
3 Beasley, Allen; Montgomery, Alabama. We have two cases  
4 that are pending here in your Court and about 20 cases  
5 that are in various stages of investigation.

6 THE COURT: Thank you.

7 MR. ROSENFELD: Your Honor, Ron Rosenfield  
8 from here in Cleveland. I have one case that I am  
9 co-counsel in that case with Mr. Laszlo and the Schaefer  
10 case, she is a Cleveland resident.

11 THE COURT: Thank you.

12 MR. KLEIN: Your Honor, Jeff Klein, Laszlo &  
13 Associates. We have an office here in Cleveland, and Ted  
14 stated our position on how many cases we have.

15 MR. M. LASZLO: Your Honor, Michael Laszlo,  
16 with the law firm of Laszlo & Associates. Mr. Theodore  
17 Laszlo has already explained our position.

18 THE COURT: Thank you.

19 MR. HUGO: Good afternoon, your Honor. John  
20 Hugo from Cooley, Manion & Jones. We have about 20 cases  
21 under investigation.

22 THE COURT: Thank you.

23 MR. SENECA: Your Honor, Mike Senega from  
24 London, Ontario, Canada. I am here basically as an  
25 observer here. I am counsel in the pending class

1 proceeding there at the law firm of Ciskins & Colby, LLP.

2 THE COURT: Thank you.

3 MR. BERTRUM: Jay Scott Bertrum, Bertrum and  
4 Graff, Kansas City office. I know we that we filed 16  
5 cases. We have looked at approximately 80, but I believe  
6 we will file only 16.

7 MR. WALLACH: Good afternoon, your Honor.  
8 Howard Wallach from the Detroit office of Foley and  
9 Mansfield, and Mr. Foley has stated our position.

10 THE COURT: Thank you.

11 MR. MARTIN: Good afternoon, Clay Martin,  
12 from the law firm of Martin and Helms in Oswald, Alabama.  
13 We have two 2 filed cases currently. One is -- there is  
14 a motion to remand back to state court in Alabama, and I  
15 have two more that we are likely to file soon and about a  
16 dozen under investigation.

17 MR. CLIMACO: Your Honor, so the record is  
18 complete, John Climaco.

19 We have one case which we are local counsel.  
20 We are about to file another case, will be filed in this  
21 Court. Dawn Chmielewski, who is also a nurse as well as  
22 an attorney, is reviewing approximately 18 cases at this  
23 time. If they are filed, they will be filed right within  
24 the MDL.

25 Thank you.

1 MR. SHUB: Your Honor, I will be happy to  
2 report that I did get some numbers. We have 25 cases in  
3 federal court, and we are currently investigating several  
4 dozen. Jonathan Shub, S-h-u-b of Cedar Weiss LLP.

5 THE COURT: That gives me some idea of the  
6 enormity of this MDL. Many of you have so many cases  
7 filed and are investigating another 50 or another 25 or  
8 another whatever.

9 Is there a rough percentage when you  
10 investigate how many of them will go to trial and how  
11 many of them would perhaps have other causes for their  
12 injuries and whatever that wouldn't be appropriate; just  
13 to try to get some kind of an idea of the enormity of  
14 what the cases we are facing here.

15 MR. SZERLAG: Your Honor, David Szerlag, and  
16 for quite a while I was with Foley and Mansfield, and we  
17 reviewed probably at one point close to 5,000 cases over  
18 the last four years, and what we found out perhaps one in  
19 about 10 of the cases we investigated turned out to be  
20 related to the phosphate litigation.

21 THE COURT: All right.

22 MR. FOLEY: Steven Foley, your Honor.

23 You inquired how many will actually proceed  
24 to trial. In all likelihood, it will be very, very few.  
25 In the course of the litigation to date, since it began

1 in December of 2004 — and Mr. Daskal filed the first  
2 lawsuit — one case commenced trial and resolved three  
3 days into trial with Mr. Gunn as lead for Defendant and  
4 myself as lead for Plaintiffs in California.

5 Since then, both sides have worked very  
6 hard to try to resolve the cases and avoid resolution  
7 by the jury, and we are continuing that process, your  
8 Honor.

9 MR. GUNN: Could I say something about that,  
10 your Honor?

11 THE COURT: Yes.

12 MR. GUNN: Because your question about how  
13 many we are going to end up with is very important to  
14 everybody. As Mr. Foley said, we had a pretty good  
15 process going settling cases, and in December, there was  
16 a recall of the product, which has spurred a whole weight  
17 of claims.

18 THE COURT: Right.

19 MR. GUNN: I would like to think that those  
20 claims are all being reviewed by now. It truly is our  
21 goal to try and resolve all this litigation. We have  
22 finite resources, and we are unable to allocate  
23 resources to claimants until we know how many we are  
24 dealing with.

25 If we settle 600 and all of a sudden we have

1 200 we didn't know about, somebody is going to come up  
2 short, and we would like to direct our efforts with the  
3 Magistrate to identifying the colorable cases and  
4 grouping them together and trying to find a way to  
5 resolve this.

6 THE COURT: Well, that's why I was — what I  
7 was driving at as well, was to try to get some idea of  
8 the magnitude of a number of the cases that you are going  
9 to have to deal with, and that's where it does make it  
10 important, that we do the preliminary discovery, and I  
11 realize also some of these cases were almost ready to go  
12 to trial or being settled when the MDL panel — I think  
13 it was the Defendant that asked for this kind of  
14 approach.

15 And so the quicker we can move along with  
16 discovery and with knowing, you know, exactly or pretty  
17 closely how many Plaintiffs you are going to have to deal  
18 with, I'd appreciate that.

19 MR. GUNN: In terms of discovery, there  
20 might be a dispute about this, but we believe most of the  
21 discovery has been done, and we would really like to  
22 spend Fleet's resources on resolving cases as opposed to  
23 reviewing documents and things.

24 THE COURT: And I think we will make that  
25 effort as well.

1                   One other question: Does anybody know of  
2 any class action cases being contemplated so far?

3                   MR. SHKOLNIK: Your Honor, for the most  
4 part — Hunter Shkolnik — for the most part, most of the  
5 lawyers we have been in contact with — and we have been  
6 speaking with many lawyers who have been advertising, who  
7 have been representing Plaintiffs, no one has been  
8 discussing a class action consumer case if that's what  
9 the Court is considering, the consumer case. Whether  
10 someone will file one down the road, it is hard to say.

11                   Unless the Defendants are aware of one from  
12 the Plaintiffs that we have been talking to, that has not  
13 been the avenue of approach people are thinking at this  
14 point in time.

15                   THE COURT: Okay.

16                   MR. CLIMACO: Your Honor, I have come to  
17 learn that there is — that Plaintiffs' counsel would  
18 like to get to the spot that defense counsel is talking  
19 about as soon as possible, but there is considerable work  
20 that has to be done.

21                   One of the things — and I think Mr. Cohen  
22 could help us considerably — as I understand it, there  
23 are a number of — (pause) — there are a substantial  
24 number of documents where Defendants have claimed  
25 privilege.



1 I understand there is a fairly extensive  
2 privilege log. Maybe that's one of the things we can  
3 get moving on quickly because that will help move this  
4 along.

5 MR. KOULETIS: Your Honor, if I could  
6 respond to that, the documents that have been identified  
7 as privileged from the collection of some 900,000 pages  
8 that have already been produced, in fact, were all  
9 submitted to Judge Goodwin in Virginia in the Burke case,  
10 and he went through, individually reviewed every single  
11 one of them and ordered us to produce 12. We think that  
12 process is complete.

13 There is no purpose served in reinventing  
14 the wheel over that. Obviously, to the extent we produce  
15 additional documents, there may be additional privilege  
16 issues, but that would be from our perspective a colossal  
17 waste of judicial resources as well as the parties'  
18 resources.

19 MR. LASZLO: Theodore Laszlo — and  
20 Mr. Foley addressed this in our papers — but  
21 Mr. Kouletis is not quite accurate about what Judge  
22 Goodwin did in the Burke case.

23 Your Honor, you have the transcripts of what  
24 actually did transpire in that event and in the Schaefer  
25 case that is before you, but what Judge Goodwin did was

1 take a representative sample and trying to on the eve of  
2 trial get through as many of the issues as he could. So  
3 to say he reviewed every single document is just  
4 inaccurate.

5 MR. KOULETIS: Well, with all due respect,  
6 we were ordered to submit every document that we were  
7 holding as privileged, and he reviewed them, and  
8 during that hearing, he specifically identified four  
9 documents having previously identified eight that he  
10 ordered us to produce, and he represented on the record  
11 that he had reviewed all the documents that we submitted  
12 to him.

13 He had ordered us to submit all of the  
14 documents we were withholding, which we did. There were  
15 four additional documents that he asked for some  
16 additional briefing on, which he never ruled on, but  
17 other than that very limited collection, he made it quite  
18 clear he was quite satisfied with the review process that  
19 had taken place.

20 MR. CLIMACO: Your Honor, obviously,  
21 disagreement, and that's why I suggest there is no one  
22 better to get into that very quickly than Mr. Cohen.

23 MR. GUNN: And, your Honor, we have no  
24 objection to Mr. Cohen or you talking to Judge Goodwin in  
25 West Virginia about that.

1                   MR. LASZLO: Nor do we. That's why we  
2 provided all the transcripts.

3                   THE COURT: All right. Then we are getting  
4 to my next — I think at this juncture I will turn over  
5 to the parties to produce a case management order. This  
6 is going to depend on the Plaintiffs being able to get  
7 their group together, and I have gone over with Mr. Cohen  
8 some of the specifics of what I want to see in this case  
9 management order, and I think that you can work it out  
10 much more quickly than having both sides file different  
11 opinions.

12                   I did make clear to Mr. Cohen that I expect  
13 this to have at the end a definite trial date. It seems  
14 to me all the years I have been on the bench the only way  
15 to keep the lawyers from putting the case I am dealing  
16 with back on a back shelf somewhere is when they know  
17 there is a firm trial date by which everything has got to  
18 be done.

19                   So that is the main thing I want the parties  
20 to come to an agreement on, and if there is no agreement,  
21 then they can, both sides can tell me why they think they  
22 can't get there that fast, and I will pick a date, but I  
23 would like to have all of these things dealt with.

24                   And I think that in that — in setting up  
25 the case management order with dates, you can deal with

1 this issue of a tutorial. It doesn't seem to me that  
2 this case has the complicated chemistry or physics or  
3 whatever else I have had to deal with in patent cases,  
4 and that should be perhaps something very short from  
5 experts on either side and then maybe a short hearing in  
6 case — well, let the other side respond, or if you want  
7 to cross-examine the other side's experts or just counter  
8 with what one says with what the other says and perhaps  
9 have a fairly short hearing in case I still have  
10 questions.

11 But I don't want to see that taking up a lot  
12 of time and a lot of expense because I don't think that  
13 any of this is that complicated. But I do want you to  
14 deal with that when you are setting up the case  
15 management order, and, David, you have a lot more  
16 experience than I have.

17 Can we — let's see, you are going to come  
18 back to me by August 31st with the Plaintiffs'  
19 organization?

20 MR. CLIMACO: Yes, we will, your Honor.

21 THE COURT: And so then how much time do you  
22 need after you have your group, your organization  
23 together before the parties can meet with their executive  
24 groups and produce a case management order for the Court  
25 or at least one that gives me some disagreement where I

1 can —

2 MR. CLIMACO: Your Honor, I am anticipating  
3 that if there is not an agreement we have reached as to  
4 leadership and I believe and I have good faith that we  
5 can do that, that the Court can issue an order almost  
6 immediately after we say we couldn't do it. So if you  
7 will give me one moment, I will be able to answer the  
8 question.

9 THE COURT: All right. Confer with your  
10 clients.

11 MR. GUNN: Billy Gunn.

12 But when they have a designated lead  
13 counsel, you know, within a day or two I would be glad to  
14 discuss with them the format put forth for you what you  
15 want.

16 THE COURT: Right.

17 MR. GUNN: And I think we will be able to  
18 agree on that, and I agree while there are a number of  
19 issues, it is not a complicated matter, just a lot to  
20 assimilate.

21 THE COURT: Right. And also what I see  
22 covered is any kind of ADR possibilities that may work  
23 for some of the Plaintiffs; may not work for a lot of  
24 them but may work for some.

25 MR. GUNN: Once we know the population of

1 claimants, then we are prepared to engage in any type of  
2 exercise that anybody wants.

3 THE COURT: Right. My thought usually has  
4 been — I don't send things for ADR unless both sides are  
5 interested or think it can do some good. If you have one  
6 side that absolutely is adamant, doesn't think it will  
7 help, there is not a lot of point in having them get  
8 involved, but I think you may have a lot of Plaintiffs  
9 who would be interested, and I would like to see that  
10 covered in the case management order as well.

11 MR. CLIMACO: Your Honor, we would like to  
12 see and we would like to submit that on Friday, September  
13 11th. We think that provides more than sufficient time  
14 once leadership is appointed, and leadership could very  
15 well be appointed much earlier because if an agreement  
16 is reached —

17 THE COURT: Well, if I don't hear anything  
18 by August 31st, then — September 1st or 2nd, you are  
19 going to have my appointment.

20 MR. CLIMACO: So by September 11th —

21 THE COURT: September 11th?

22 MR. GUNN: It is an interesting date, your  
23 Honor.

24 THE COURT: All right. Now, is there  
25 anything else that I need to ever could today?

1 David, anything else?

2 DEPUTY CLERK KIRKPATRICK: Judge, may I say  
3 something?

4 For those of you who know Renee Schumitsh,  
5 she is our MDL expert in the Clerk's office. Mr. Bush,  
6 you may want to take one of her cards, and she handles  
7 all the incoming cases for the entire District on all the  
8 MDLs. She is in charge of thousands of cases.

9 She is very helpful for any kind of  
10 questions you have regarding the clerk's office or  
11 filings or if you have any technical filings that you may  
12 encounter with our ECF program.

13 MR. TATE: Is that her business card? Can I  
14 have that?

15 Thanks.

16 THE COURT: Anybody have anything else?

17 MR. GUNN: I would like to float an idea,  
18 and that would be that once it is resolved who the  
19 committee and lead counsel is, that perhaps each side  
20 meet separately with Mr. Cohen and discuss issues and  
21 see — and he can make an independent determination as  
22 to, you know, where we are sort of in agreement and where  
23 we are not, and it may speed up this whole process if  
24 they are agreeable to each side meeting separately.

25 MR. CLIMACO: I don't think we disagree; we

1 just want to get moving. If that will move it, fine, but  
2 I think a lot of that direction is best in my experience  
3 coming from Mr. Cohen.

4 SPECIAL MASTER COHEN: We will be in touch.

5 THE COURT: All right. I will have his  
6 appointment order out in the next couple of days, too,  
7 and you can be in touch with Mr. Cohen with the parties.  
8 All right.

9 Is there anything anybody else wants to put  
10 on the record that they haven't had a chance to do to  
11 date? I do appreciate for many of you making the effort  
12 to be here, and we will move as quickly and as  
13 efficiently as we can.

14 (Hearing concluded at 2:25 p.m.)

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C E R T I F I C A T E

I, George J. Staiduhar, Official Court  
Reporter in and for the United States District Court,  
for the Northern District of Ohio, Eastern Division,  
do hereby certify that the foregoing is a true  
and correct transcript of the proceedings herein.

s/George J. Staiduhar  
George J. Staiduhar,  
Official Court Reporter

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